Sivalingam a/l S Ponniah & Ors v Balakrishnan a/l S Ponniah & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–59 OF 1988
ZULKEFLI J
8 MAY 2003

Civil Procedure *— Contempt of court — Committal proceedings — Application for — Whether there was breach of court order — Whether there was non-compliance of procedure by plaintiff in application for a committal order — Whether plaintiff proved beyond reasonable doubt charges made against defendants*

The first plaintiff applied for committal proceedings against the first and second defendants pursuant to O 52 r 2(2) of the Rules of High Court, 1980 ('the RHC') for breaching an order of the court ('the said order'). The said order was endorsed with a notice in Form 87 in accordance with O 45 r 7 of the RHC, which stated that the first and second defendants would be liable to a process of execution for the purpose of compelling them to obey the same. The first plaintiff contended that even though the first and second defendants had personal knowledge of the said order, the first and second defendants still breached the said order.

Held, dismissing the application:

(1) A committal proceeding is a criminal or quasi-criminal proceeding. In the first instance, the first plaintiff has to prove that he had complied with the stipulated rules and procedures. Having proved that, then the first plaintiff has to prove that both the defendants are guilty of the allegations or charges made against them. The burden of proof is proof beyond reasonable doubt and this burden is on the first plaintiff, both as to the rules and procedures and as to the guilt alleged. Failure by the first plaintiff to so prove either of the requirements would be fatal to the first plaintiff's application (see p 357E–F).

(2) There was been non-compliance by the first plaintiff with the procedure for the application of a committal order against the first and the second defendants. The first plaintiff failed to prove beyond reasonable doubt that the documents such as the notice of motion, the ex parte order, the statement and the notice of adjournment of the hearing of the notice of motion were served on both the defendants and the mode under which the said documents were served. The first plaintiff also failed to show that an affidavit of service of the said relevant documents had been filed before the hearing of the application for a committal order against both the defendants (see p 359A–C).

(3) Unless both the defendants admitted the allegations without qualification, the requirement that the first plaintiff had to prove the charges beyond reasonable doubt continues to remain similar

to the duty of the prosecution to prove a charge beyond reasonable doubt in a criminal trial. The defendants in this case had denied the allegations by their reply sent through their solicitors. The defendants in this case had denied the allegations by their reply sent through their solicitors. The defendants had also referred to the allegations and denied the said allegations in the affidavit of the second defendant. Therefore it is the duty of the first plaintiff and incumbent upon him to prove his allegations or charges beyond reasonable doubt before an order of committal can be obtained against both the defendants. The first plaintiff has not proved beyond reasonable doubt the charges made by him against both the defendants (see pp 360G–I, 361I).

[Bahasa Malaysia summary

Plaintif pertama telah memohon satu prosiding komital terhadap defendan-defendan pertama dan kedua menurut A 52 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana telah melanggar satu perintah mahkamah ('perintah tersebut'). Perintah tersebut telah diindorskan dengan satu notis dalam Borang 87 menurut A 45 k 7 KMT, yang menyatakan bahawa defendan-defendan pertama dan kedua adalah bertanggungjawab kepada satu proses perlaksanaan bagi tujuan memaksa mereka mematuhi yang sama. Plaintif pertama menegaskan bahawa walaupun defendan-defendan pertama dan kedua mempunyai pengetahuan peribadi tentang perintah tersebut, defendan-defendan pertama dan kedua masih telah melanggar perintah tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Satu prosiding komital adalah satu prosiding jenayah atau separa jenayah. Pertama sekali, plaintif perlu membuktikan bahawa beliau telah mematuhi peraturan-peraturan dan prosedur-prosedur yang ditetapkan. Setelah membuktikan demikian, maka plaintif pertama perlu membuktikan bahawa kedua-dua defendan adalah bersalah terhadap pengataan-pengataan atau pertuduhan-pertuduhan yang dibuat terhadap mereka. Beban bukti adalah bukti melampaui keraguan munasabah dan beban ini terletak atas plaintif pertama, terhadap kedua-dua peraturan-peraturan dan prosedur-prosedur dan terhadap kebersalahan yang dikatakan. Kegagalan plaintif pertama untuk membuktikan mana-mana daripada keperluan tersebut akan memudaratkan permohonan plaintif pertama (lihat ms 357E–F).

(2) Tiada ketidakpatuhan oleh plaintif pertama dengan prosedur untuk permohonan satu perintah komital terhadap defendan-defendan pertama dan kedua. Plaintif pertama telah gagal untuk membukti melampaui keraguan munasabah yang dokumen-dokumen seperti notis usul, perintah ex parte, pernyataan dan

notis penangguhan perbicaraan untuk notis usul telah disampaikan ke atas kedua-dua defendan dan cara dokumen-dokumen tersebut telah disampaikan. Plaintif pertama juga telah gagal untuk menunjukkan bahawa satu afidavit penyampaian dokumen-dokumen yang relevan telah difailkan sebelum perbicaraan untuk permohonan satu perintah komital terhadap kedua-dua defendan (lihat ms 359A–C).]

(3) Kecuali jika kedua-dua defendan-defendan mengaku terhadap pengataan-pengataan tersebut tanpa bersyarat, keperluan di mana plaintif perlu membuktikan pertuduhan-pertuduhan tersebut melampaui keraguan munasabah masih kekal sama seperti tugas pihak pendakwa untuk membuktikan satu pertuduhan melampaui keraguan munasabah dalam satu perbicaraan jenayah. Defendan-defendan dalam kes ini telah menafikan pengataan-pengataan tersebut melalui jawapan mereka yang dihantar melalui peguamcara mereka. Defendan-defendan juga telah merujuk kepada pengataan-pengataan tersebut dan menafikan pengataan-pengataan tersebut dalam afidavit defendan kedua. Oleh itu, ia adalah tugas plaintif pertama dan adalah wajib untuk beliau membuktikan pengataan-pengataan atau pertuduhan-pertuduhan beliau melampaui keraguan munasabah sebelum satu perintah komital boleh diperolehi terhadap kedua-dua defendan. Plaintif pertama tidak dapat membuktikan melampaui keraguan munasabah pertuduhan-pertuduhan yang dibuat oleh beliau terhadap kedua-dua defendan tersebut (lihat ms 360G–I, 361I).]

Notes

For cases on commital proceedings, sse 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1466–1472.

Cases referred to

Capital Insurance Bhd v BS Sidhu [1996] 3 MLJ 1 (refd)
Gordon v Gordon [1946] 1 All ER 247 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126 (refd)

Legislation referred to

Rules of High Court 1980 O 45 r 7, O 52(1), O 52(3), O 52 rr 2(2), 5(3), (4), Forms 49, 87, 110

Gunaseelan (*YL Hiew* with him) (*G Gunaseelan & Assoc*) for the applicant/first plaintiff.

S Periasamy (*M Kumar* with him) (*Radzi Sheikh Ahmad & Peri*) for the defendant.

Zulkefli J: This is the first plaintiff s application by way of notice of motion dated 31 October 2002 for committal proceedings against the first and second defendants pursuant to O 52 r 2(2) of the Rules of High Court 1980 ('the RHC'). By an order of this court dated 12 April 1988 ('the said order') the court had ordered, inter alia, as follows:

> That the defendants, whether acting by themselves, their servants, officers, employees, representatives or agents or any of them or otherwise howsoever until trial of this action or further order be restrained from:
>
> (a) preventing the plaintiffs from exercising their lawful rights as directors of the fourth and fifth defendants and in particular though without prejudice to the generality of the foregoing be restrained from preventing the plaintiffs exercising their lawful right of entry, ingress and egress over the properties of the fourth and fifth defendants and exercising their right to inspect the books and documents of the fourth and fifth defendants.
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> (b) registering any purported change in the directorship of the fourth and fifth defendants and in particular any purported dismissals of the plaintiffs as directors of the fourth and fifth defendants except with the written consent of the plaintiffs.
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> (c) allotting or issuing any shares in the fourth and fifth defendants or from registering or purporting to register any purported transfer of shares by the plaintiffs in the fourth and fifth defendants except with the written consent of the plaintiffs.
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> (d) removing or giving directions to Citibank NA, 28 Medan Pasar, Kuala Lumpur, Hong Kong and Shanghai Banking Corporation, Main Office, Overseas Union Bank Ltd, OUB Building, Medan Pasar, Kuala Lumpur, Malayan Banking Berhad, Jalan Yong Shook Lin, Petaling Jaya or any other bank or financial institution to remove any of the plaintiffs as authorized signatories to the accounts of the fourth and fifth defendants with such banks or financial institution except with the written consent of the plaintiffs.
>
> (e) appointing any of the defendants or giving instructions to Citibank NA, 28 Medan Pasar, Kuala Lumpur, Hong Kong and Shanghai Banking Corporation, Main Office, Overseas Union Bank Ltd, OUB Building, Medan Pasar, Kuala Lumpur, Malayan Banking Berhad, Jalan Yong Shook Lin, Petaling Jaya or any other bank or financial institution to appoint any of the defendants as authorized signatories to the accounts of the fourth and fifth defendants with such banks or financial institution except with the written consent of the plaintiffs.
>
> (f) opening any new accounts on behalf of the fourth and fifth defendants at any bank or financial institution except with the written consent of the plaintiffs.

The said order was endorsed with a notice in Form 87 in accordance O 45 r 7 of the RHC, which stated that the first and second defendants would be liable to a process of execution for the purpose of compelling them to obey the same. For the first plaintiff it was submitted that a sealed copy of the said order had been served on the first and second defendants and also on their solicitors of that time, that is Messrs Durai & Associates, whose address for service is at 7th & 8th Floors, Bangunan MOCCIS, Jalan Melaka, 50100 Kuala Lumpur.

A It is the contention of the first plaintiff that even though the first and second defendants had personal knowledge of the said order, the first and second defendants still breached the said order, specifically cll (b) and (f). The first plaintiff has alleged that the first and second defendants had changed the directorship of the fifth defendant company by appointing themselves as directors of the fifth defendant company and had filed various B Forms 49 on 18 August 2000, 10 November 2000 and 18 September 2000 with the registrar of companies. The first plaintiff contended that the first and second defendant's self-appointment as directors, as well as filing in the relevant processing forms to show the said appointment have in fact altered the particulars of the directorship in fifth defendant company, and as such C had breached cl (b) of the said order.

The first plaintiff has also alleged that the first and second defendants had opened a new account on behalf of the fifth defendant company without the consent of the plaintiffs under Bank Account No 026–10–02500 at EON Bank, Jalan Tun Perak and had been accepting rental payments through the said account on behalf of the fifth defendant D company. As such, the first plaintiff contended that both the defendants had clearly breached cl (f) of the said order.

Based on the above submission, the first plaintiff states that the breach of the said order by the first and second defendants clearly proved that they had committed a contempt of court in a civil proceeding and be punished E accordingly.

The rules and law applicable

A committal proceeding is a criminal or quasi criminal proceeding. In the first instance, the first plaintiff has to prove that he had complied with the F stipulated rules and procedures. Having proved that, then the first plaintiff has to prove that both the defendants are guilty of the allegations or charges made against them. The burden of proof is proof beyond reasonable doubt and this burden is on the first plaintiff, both as to the rules and procedures and as to the guilt alleged. Failure by the first plaintiff to so prove either of G the requirements is fatal to the first plaintiff's application.

Order 52 of the RHC 1980 is the order which is relevant and governs committal proceedings. Order 52(1) r 1 states as follows:

> The power of the High Court to punish for contempt of court may be exercised by an order of committal in Form 110.

H The relevant part of Form 110 is reproduced as follows:

> No 110
> ORDER OF COMMITTAL
> (Title as in action)
>
> I Upon motion this day made unto this court by counsel for the plaintiff and upon reading the affidavit of ... filed the ... day of ..., 20... of service on the defendant ... of a copy of the order of the court dated the ... day of ..., 20...and of notice of this motion.

Order 52(3) of the RHC states as follows:

> (1) When leave has been granted under r 2 to apply for an order of committal, the application for the order must be made by motion to the court and, unless the court or judge granting leave has other wise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing;
>
> (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse;
>
> (3) Subject to para (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under r 2, must be served personally o the person sought to be committed;
>
> (4) Without prejudice to the powers of the court or judge under O 62 r 5, the court or judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.

I am of the view that reading O 52 rr 1 and 3 of the RHC together with Form 110, it is clear that the documents that ought to have been served by the first plaintiff on both the defendants are the notice of motion dated 31 October 2002, the ex parte order that was obtained by the first plaintiff on 28 October 2002 granting leave, the statement dated 17 September 2002 and the affidavit of the first plaintiff affirmed 13 September 2002. The service of all the said documents ought to have been by way of personal service on both the defendants and the first plaintiff ought to have affirmed and filed the affidavits of service that each of the defendant was personally served to prove personal service had been effected on them.

On the need to comply strictly with the stipulated rules and procedures in a contempt proceeding his lordship Lord Greene MR in *Gordon v Gordon* [1946] 1 All ER 247 had this to say at p 250:

> Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject, such rules as exist in relation to them must be strictly obeyed. However disobedient the party against the order is directed may be, unless the process of committal and attachment has been strictly carried out in accordance with the rules, he is entitled to his freedom.

This principle was accepted and reiterated in Malaysia in the Court of Appeal case of *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1 wherein the Court of Appeal, inter alia, held as follows at p 2:

> Before contempt proceedings, which affects the liberty of a subject, can be enforced, there must be strict compliance with the rules that require the order of the court be served on the plaintiffs counsel.

Decision of the court

Having studied the affidavits filed on behalf of the applicant/first plaintiff and on behalf of the first and second defendants and having heard the submissions of learned counsels for the first plaintiff and the first and second defendants, I hereby dismissed with costs the first plaintiff's notice of motion for a committal order to be made on the first and second

defendants. My reasons for dismissing the first plaintiffs application are as follows.

It is my finding that there has been a non-compliance by the first plaintiff with the procedure for the application of a committal order against the first and the second defendants. The first plaintiff has failed to prove beyond reasonable doubt that the documents such as the notice of motion dated 30 October 2002, the ex parte order dated 28 October 2002, the statement dated 17 September 2002 and the notice of adjournment of the hearing of the notice of motion on 14 November 2002 were served on both the defendants and the mode under which the said documents were served. The first plaintiff has also failed to show that an affidavit of service of the said relevant documents have been filed before the hearing of this application for a committal order against both the defendants.

According to the records, counsel who appeared for the first plaintiffs 14 November 2002 had sought an adjournment. He had on that date referred to only three documents, ie the notice of motion dated 30 October 2002, the statement and the affidavit of the first plaintiff and stated that the said documents had been served on the first and second defendants. It is instructive and significant to note that:

(i) He did not make reference to the ex-parte order granting leave dated 28 October 2002 and did not state whether the said order had been served;

(ii) He did not state whether service of the three documents was by way of personal service;

(iii) He did not state whether the Affidavit of Service had been filed.

The application which had been fixed to be heard on 14 November 2002 was postponed for the reasons given by the counsel who appeared for the first plaintiff, and on 23 December 2002, it was fixed as the adjourned day of the hearing. Both the first and second defendants were not present in court on 14 November 2002. I am of the view that the notice of the adjourned hearing date ought to have been given to both the defendants again by way of personal service. The defendants only came to know of the date of the adjourned hearing through a letter sent by the first plaintiff s solicitors to the previous solicitors for the defendants. It has to be treated that the information to the defendants' solicitors of the adjourned date of hearing is not personal service as required. Therefore there is no evidence whatsoever that the first plaintiff had notified each of the defendants of the adjourned hearing date by way of personal service. No affidavit or other documentary evidence of this notification had been filed in court by the first plaintiff. On this issue of the need to notify the defendants of the adjourned hearing date I would like to refer to the case of *Bank Utama (Malaysia) Berhad v Dato' Wong Yeon Chai* [2000] MLJU 566, where Steve Shim J (as his Lordship then was), inter alia, had this to say:

> Where committal is sought, although the court has power to dispense with service of notice of motion, personal service will generally be insisted upon. The need for service also applies to a notice of an adjourned hearing date.

> Hence, it was incumbent on the plaintiff to notify the defendant of the adjourned hearing date of the notice of motion by way of personal service.

It was held in the above mentioned case that the plaintiff s failure to notify the defendant of the adjourned hearing date by way of personal service is fatal to its application for a committal order.

Even assuming that the first plaintiff had strictly complied with all the rules and procedures, it does not follow as a matter of course that both the defendants are guilty of the allegations or charges and should be committed. It is still incumbent on the first plaintiff to then prove beyond reasonable doubt that both the defendants are guilty of the allegations or charges made by the first plaintiff against them. In this respect, I would like to refer to O 52 r 5(3) and (4) of the RHC which are as follows:

> (3) Except with the leave of the court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement under r 2; The foregoing provision is without prejudice to the powers of the court under O 20 r 8;
>
> (4) If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so.

Learned counsel for the first plaintiff contended that the allegations raised by the first plaintiff against both the defendants in the plaintiff's affidavit were not denied or explained by the defendants in their affidavits and therefore the allegations are treated as being admitted. He relied on the said contention based on the observations of his Lordship Gopal Sri Ram JCA in the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. With respect, this submission is not correct factually and is fallacious. It is also wrong and untenable in law. It should be noted that the observations of the learned judge in *Ng Hee Thoong*'s case were made in a civil case involving summary judgment and affidavits filed and are not applicable here. The case before this court now is a committal proceeding. Even if both the defendants have not denied the allegations made in the first plaintiff's affidavit or have not filed any affidavit, that in my view does not mean or follow that the first plaintiff has proved the allegations. Unless both the defendants admit the allegations without qualification, the requirement that the first plaintiff has to prove the charges beyond reasonable doubt continues to remain similar to the duty of the prosecution to prove a charge beyond reasonable doubt in a criminal trial.

The defendants in this case had denied the allegations by their reply sent through their solicitors. The defendants had also referred to the allegations and denied the said allegations in the affidavit of the second defendant. The defendants have also dealt with several other matters in their affidavits. Therefore it is the duty of the first plaintiff and incumbent upon him to prove his allegations or charges beyond reasonable doubt before an order of committal can be obtained against both the defendants. The first plaintiff's allegation against both the defendants is in connection with cl (b) of the said order dated 12 April 1988 which is as follows:

> The first and second defendants changed the directorship of the fifth defendant company by appointing themselves as directors of the fifth defendant company.

On the above allegation or charge against both the defendants, I find the substance of the allegation is that both the defendants were said to have never been the directors prior to that date 12 April 1988 and became or appointed themselves as directors only in the year 2000. This allegation is not only misleading but also untrue. Both the defendants were already directors of the fifth defendant prior to and on the date the said order dated 12 April 1988 was made. They have the night to continue to remain as directors, and they remain as directors. It must be stated here that it was the first plaintiff acting in collusion with certain other persons, who wrongfully and unlawfully attempted to change the composition of the board of directors that existed as at 12 April 1988 by attempting to remove both the defendants in December 1988 in breach of cl (b) of the said order dated 12 April 1988. This is evidenced by the documents in exhs 'SSP2' and 'SSP3' of the affidavit of the first plaintiff himself. The first plaintiff had also in breach of the said order attempted to appoint his wife and son as directors wrongfully and unlawfully after the said order dated 12 April 1988 was made. The documents in exhs 'SSP6' and 'SSP7' which the first plaintiff had produced and relied on to prove his allegation do not show or prove that both the defendants had become or appointed themselves as directors for the first time in September 2000. Further, the said documents are selective in nature and are misleading. The first plaintiff had willfully suppressed other relevant documents which would prove that both the defendants were directors prior to and on 12 April 1988.

The other allegation made by the first plaintiff against both the defendants is in connection with cl (f) of the said order dated 12 April 1988 which is as follows:

> The first and second defendants opened a new account on behalf of the fifth defendant company without the consent of the plaintiffs.

On the above allegation or charge against both the defendants, I find that the first plaintiff had made bare allegations in his affidavit which have not been corroborated. The documents in exhs 'SSP12' and 'SSP13' do not show or prove that both the defendants had opened the bank account as alleged. The first plaintiff has not proved this allegation or charge. Further, it has to be noted that on the application made by the defendants the court had appointed Veloo & Co as special manager on 27 January 2001 to manage the affairs of the fifth defendant company. Veloo & Co remained as special manager and managed the affairs of the fifth defendant until 30 August 2001. It was within the powers and responsibilities of the special manager to manage and attend to the financial affairs of the fifth defendant, including the receiving and banking of monies paid or payable to the fifth defendant. The documents in exhs 'SSP12' and 'SSP13' relate to the period when the special manager managed the affairs of the fifth defendant. I therefore find that the first plaintiff has not proved beyond reasonable doubt the charges made by him against both the defendants.

Other relevant considerations

The committal proceedings by the first plaintiff against both the defendants in this case cannot and should not be considered in isolation. It must be noted that commencing in 1988 and until now, there have been several suits involving the first plaintiff and the defendants. There have also been several applications and cross applications. There have been allegations and counter allegations. Numerous affidavits have been filed by various parties including the first plaintiff and both the defendants. Orders have been made,, either as decision of the court or by consent which modify, vary or suspend the material part of the said order dated 12 April 1988. special managers had been appointed and had managed the affairs of the fifth defendant. All these documents and orders would have to be read and considered in order to arrive at a just decision on this committal proceedings. In this context, I would like to refer to the case of *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126 where his Lordship, Gill CJ in delivering the judgment of the Federal Court said as follows at p 127:

> Having heard arguments from both sides the view which we took was that the learned judge had decided the whole case solely on the affidavits. It is clear that there were affidavits on both sides, so that on mere consideration of such affidavits it was quite impossible to say that the guilt of the appellant has been proved with such strictness of proof as is consistent with the test of 'beyond reasonable doubt'. The order which the appellant was alleged to have failed to comply with was an interim order. The action is yet to be tried for the final order to be made. In all the circumstances of the case we felt that the appellant's imprisonment for contempt of court could not be sustained. We therefore allowed the appeal and set aside the order of the court below.

To conclude, I would sum up by stating that given the complexity, background and nature of the matters connected with this committal proceeding, and the numerous documents that have been filed by the parties and orders made, this is not a case where a finding of guilt can be arrived at by considering only the affidavit that was filed by the first plaintiff when he embarked on the committal proceedings.

Application dismissed.

Reported by Peter Ling